Supreme Court, U.S.
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No. 96 349

In The

Supreme Court of the United States

October Term, 1995

T.A. MUSICK and JAMES CHARACTER,

Petitioners,

vs.

GOODYEAR TIRE & RUBBER COMPANY, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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51 pp

QUESTIONS PRESENTED

I. What statute of limitation applies to a claim under 29 U.S.C. § 1140 against an employer/fiduciary?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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Petitioners, T. A. Musick and James Character, respectfully petition for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals.

OPINIONS BELOW

The case to be reviewed is *Musick v. Goodyear Tire & Rubber Company, Inc.*, 81 F.3d 136 (1996) (App. B). Suggestion for Rehearing En Banc was denied June 16, 1996 (App. A). The District Court decision is Appendix D with the Memorandum Opinion as Appendix E. The District Court denied a request for reconsideration (App. C).

STATEMENT OF JURISDICTION

This Court has authority for this review under 28 U.S.C. § 1254(1) and Rule 10.1(c), Rules of the Supreme Court.

STATUTES INVOLVED

The pertinent provisions of ERISA, 29 U.S.C. § 1001, *et seq.*, are set forth below:

> **28 U.S.C. § 1658. Time limitations on the commencement of civil actions arising under Acts of Congress**
>
> Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.

29 U.S.C. §1104(a)(1) — Fiduciary Duties.

(a) Prudent man standard of care

(1) Subject to sections 1103(e) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

29 U.S.C. § 1109(a) — Liability for Breach of Fiduciary Duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

29 U.S.C. § 1113 — Limitation of actions

No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of —

(1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or

(2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;

except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

29 U.S.C. §1132(a)(3) — Civil Enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

29 U.S.C. §1140. Interference with protected rights

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. § 301 *et seq.*], or for the purpose of interfering with the attainment of any right to

> which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

Other state statutes considered by the Eleventh Circuit Court of Appeals are:

> **O.C.G.A. § 9-3-22 (1982) (Georgia Code)**
>
> **9-3-22** Enforcement of rights under statutes, acts of incorporation; recovery of wages, overtime, and damages.
>
> All actions for the enforcement of rights accruing to individuals under *statutes* or acts of incorporation or by operation of law shall be brought within *20 years* after the right of action has accrued; provided, however, that all actions for the recovery of *wages*, overtime, or damages and penalties accruing under laws respecting the payment of wages and overtime shall be brought within two years after the right of action has accrued.

§§ 6-2-38(l&m) *Code of Alabama* 1975. Commencement of actions — Two years.

(l) All actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section must be brought within two years.

(m) All actions for the recovery of wages, overtime, damages, fees, or penalties accruing under laws respecting the payment of wages, overtime, damages, fees, and penalties must be brought within two years.

§ 6-2-34(4&9) *Code of Alabama* 1975. Commencement of actions — Six years.

The following must be commenced within six years:

(4) Actions founded on promises in writing not under seal.

(9) Actions upon any simple contract or speciality not specifically enumerated in this section.

§ 25-5-11.1 *Code of Alabama* 1975. Employee not to be terminated solely for action to recover benefits nor for filing notice of safety rule violation.

No employee shall be terminated by an employer solely because the employee has

> instituted or maintained any action against the employer to recover workers' compensation benefits under this chapter . . .

STATEMENT OF THE CASE

Petitioners were long-time employees of Respondent (Excerpts 1, 65). Petitioners were participants in Respondent's retirement plan for salaried employees as well as its health care coverage plan (Excerpts 48, p. 2). Under Respondent's written retirement plan, an employee is eligible to obtain full retirement benefits when (a) he reaches age 55 and has 10 years' service, or (b) he has 30 years of service regardless of age (Excerpts 48, p. 2). Goodyear is the administrator of the Plan and is the self-insured medical provider. Goodyear is therefore a fiduciary under the ERISA plan.

On January 29, 1990, Respondent notified Petitioner Musick that, due to a reduction in force, he would be laid off from work. Petitioner Musick was laid off from his position on April 17, 1990. At the time of his layoff, Musick was 50 years old, and had been employed by Respondent for 19 years, 10 months. On September 5, 1990, Petitioner Character was laid off from his position. At that time, Petitioner Character was 45 years old and had been employed by Respondent for 25 years, 6 months (Excerpts 48, p. 2).

After Petitioner Character threatened suit under ERISA, Goodyear rehired Character but refused to give him full service time and refused damages, including medical benefits (Excerpts 65, pp. 1-2). After Petitioner Musick filed suit under ERISA, he was rehired (Excerpts 1; 10, p. 2). Goodyear refused to give him service time or damages, including medical benefits.

Petitioners were due to be "terminated" four years from the

dates of layoff (Excerpts 1, 65). Petitioners filed ERISA claims more than two years after layoff, but during the four-year layoff period and before they were formally terminated under the four-year rule.

At the time of filing the suits, there was no judicial determination of a statute of limitation for 29 U.S.C. § 1140 claims for Alabama employees. At the time of filing suit, the Eleventh Circuit did not allow plan beneficiary suits against a fiduciary for breach of fiduciary duty. *Simmons v. Southern Bell Telephone & Telegraph Company,* 940 F.2d 614 (11th Cir. 1991).

The United States District Court dismissed the lawsuit by summary judgment, holding that the claims were barred by Alabama's two year statute of limitations. The court relied on *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237 (11th Cir. 1989), and § 25-5-11.1 *Code of Alabama* 1975 (Alabama's Retaliatory Discharge Statute which is governed by 2-year tort statute of limitation, § 6-2-38(1) *Code of Alabama* 1975; and on § 6-2-38(m) *Code of Alabama* 1975 relating to claims for wages. Petitioners appealed.

After this case was argued at the Eleventh Circuit Court of Appeals but before it was decided, the United States Supreme Court on March 19, 1996, in *Varity Corp. v. Howe,* 116 S. Ct. 1065 (1996), ruled that employees could sue an employer/fiduciary for breach of fiduciary duties.

On April 23, 1996, the Eleventh Circuit, in a case of first impression, affirmed the lower court decision by holding that Petitioners' claims were barred by Alabama's two-year statute of limitations.

On May 8, 1996, Petitioners filed a suggestion for rehearing *en banc* with the Eleventh Circuit Court of Appeals asking the

court to reconsider its decision and to apply the six-year statute of limitations pursuant to 29 U.S.C. § 1104 and 29 U.S.C. § 1113. The application was denied June 16, 1996 (App. A).

REASONS FOR GRANTING THE WRIT

This Court should grant the writ because this is a case of first impression regarding the statute of limitations for a claim under 29 U.S.C. § 1140 against an employer/fiduciary subsequent to the Court's ruling in *Varity Corp. v. Howe*, 116 S. Ct. 1065 (1996), whereby employees may sue on employer/fiduciary for breach of fiduciary duties.

I.

THE DECISION OF *VARITY CORP. V. HOWE*, 116 S. Ct. 1065 (1996), MANDATES APPLICATION OF THE FEDERAL SIX-YEAR STATUTE OF LIMITATION AT 29 U.S.C. § 1113 FOR 29 U.S.C. § 1140 CLAIMS AGAINST AN EMPLOYER/FIDUCIARY.

1. On March 19, 1996, the United States Supreme Court issued a decision in *Varity Corp. v. Howe*, 116 S. Ct. 1065 (1996), which alters the analysis and outcome of the present case. The Supreme Court held that an employee/beneficiary could sue the employer/fiduciary as an ERISA fiduciary when the employer misled employees regarding ERISA benefits.

2. Prior to the *Howe* decision, the Eleventh Circuit did not recognize direct employee fiduciary claims against a fiduciary or against an employer/fiduciary:

> The district court held that Vicki was entitled to recover damages from Southern Bell under *29 U.S.C. Sec. 1132(a)(1)(B)*

> based on the company's breach of its fiduciary duties. A cause of action for an ERISA fiduciary's breach of its duties arises under *29 U.S.C. Sec. 1109* rather than Sec. 1132(a)(1)(B), and *Sec. 1109 does not permit an individual beneficiary to recover damages for breach of fiduciary duties. Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134, 140, 105 S. Ct. 3085, 1089, 87 L.Ed.2d 96 (1985).*
>
> *29 U.S.C. Sec. 1109(a)* (emphasis added). The plain language of Sec. 1109(a) makes it clear that only the plan, and not an individual beneficiary, may recover damages for a breach of fiduciary duties.

Simmons v. Southern Bell Telephone & Telegraph Co., 940 F.2d 614, 616 (11th Cir. 1991).

3. The *Varity Corp.* decision has changed the analysis of an employee claim against an employer/fiduciary with regard to benefits because such a claim is now considered a claim for breach of fiduciary duty.

4. Prior to the *Varity Corp.* decision, the courts of appeals, relying on *Wilson v. Garcia*, 105 S. Ct. 1938 (1985) (1983 claims characterized as personal injuries claims), have applied the statute of limitations applicable to the state-law cause of action most closely analogous to the ERISA action in question. *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237 (11th Cir. 1989).

5. If the employer is the plan administrator and therefore a fiduciary, as in this case, the employee may assert claims and relief under 29 U.S.C. § 1104 of ERISA:

> Section 404(a), in furtherance of this general objective, requires fiduciaries to discharge their duties "solely in the interest of the participants and beneficiaries." Given these objectives, it is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries a remedy.

116 S. Ct. 1078.

6. The major thrust of the *Varity Corp.* decision is to give wronged employees a remedy:

> Fourth, ERISA's basic purposes favor a reading of the third subsection that provides the Petitioners with a remedy. The statute itself says that it seeks
>
> > "to protect ... the interests of participants ... and ... beneficiaries ... by establishing standards of conduct, responsibility, and obligation for fiduciaries ... and ... providing for appropriate remedies ... and ready access to the Federal courts." ERISA § 2(b).

116 S. Ct. 1078.

> We are not aware of any ERISA-related purpose that denial of a remedy would serve. Rather, we believe that granting a remedy is consistent with the literal language of the statute, the Act's purposes, and pre-existing trust law.

116 S. Ct. 1079.

7. Claims for breach of fiduciary duty have a six-year statute of limitation under 29 U.S.C. § 1113 and 29 U.S.C. § 1132(a)(3).

8. The *Varity Corp.* decision was decided after oral argument but before the decision was issued.

9. Without the benefit of *Varity Corp.*, the Eleventh Circuit Court of Appeals determined, as an issue of first impression for the federal courts of Alabama, that Alabama's two-year statute of limitation at § 6-2-38(1) *Code of Alabama* 1975 applicable to § 25-5-11.1 *Code of Alabama* 1975 (Alabama's Retaliatory Discharge Statute) and § 6-2-38(m) *Code of Alabama* 1975 (Alabama's statute of limitation for wages) governs 29 U.S.C. § 1140 ERISA claims for Alabama employees.

II.

THE CIRCUITS HAVE APPLIED DIFFERENT AND VARIED STATUTES OF LIMITATIONS TO CLAIMS UNDER 29 U.S.C. § 1140.

1. In *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3rd Cir.), the Third Circuit applied the state statute of limitations for employment discrimination claims.

2. In *McClure v. Zoecon, Inc.*, 936 F.2d 777 (5th Cir. 1991), the Fifth Circuit Court of Appeals adopted the statute of limitations for wrongful discharge claims.

3. In *Taylor v. Goodyear Tire & Rubber Co.*, 1994 U.S. App., Lexis 29307 (6th Cir. 1994), the Sixth Circuit applied the state statute of limitations for employment discrimination and/or wrongful termination law.

4. In *Teumer v. General Motors Corp.*, 34 F.3d 542 (7th Cir. 1994), the Seventh Circuit applied the statute of limitations for retaliatory discharge claims.

5. In *Heideman v. PFL, Inc.*, 904 F.2d 1262 (8th Cir. 1990), the Eighth Circuit applied the state statute of limitations for contract claims.

6. In *Adamson v. Armco, Inc.*, 44 F.3d 650 (8th Cir. 1995), the Eighth Circuit applied the state statute of limitations for recovery of wages or overtime for damages, fees or penalties accruing under any federal or state law respecting the payment of wages or overtime or damages.

7. In *Felton v. Unisource Corp.*, 940 F.2d 503 (9th Cir. 1991), the Ninth Circuit adopted the state statute of limitations for wrongful termination or retaliatory discharge claims.

8. In *Hinton v. Pacific Enterprise*, 5 F.3d 391 (9th Cir. 1993), the Ninth Circuit applied the contract statute of limitations for 29 U.S.C. § 1140 claims. However, the court applied a 2-year statute of limitations on oral contracts. In *Felton v. Unisource, Inc.*, 940 F.2d 503 (9th Cir. 1991), the Ninth Circuit applied a 2-year statute of limitations on *ex delicto* actions due to differences of the law of California and the state in which *Felton* arose.

9. In *Held v. Manufacturers Hanover Leasing Corp.*, 912 F.2d 1197 (10th Cir. 1990), the Tenth Circuit adopted the state statute of limitations for employment discrimination claims.

10. The Eleventh Circuit has ruled that claims under 29 U.S.C. § 1140 (ERISA) may be in the nature of retaliatory discharge, a tort, as in *Byrd v. MacPapers*, 961 F.2d 157 (11th Cir. 1992), or in the nature of a breach of contract as in *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237 (11th Cir. 1989).

III.

IF THE SIX-YEAR ERISA STATUTE OF LIMITATION (29 U.S.C. § 1113) FOR FIDUCIARY CLAIMS DOES NOT APPLY TO PETITIONERS' CLAIMS AGAINST GOODYEAR, THE FOUR-YEAR STATUTE OF LIMITATION FOUND AT 28 U.S.C. § 1658 FOR CAUSES OF ACTIONS ARISING UNDER AN ACT OF CONGRESS APPLIES.

1. In the Practice Commentary to the U.S. Code Annotated, David Siegel states:

> Even as to a cause of action arising out of a law enacted before December 1, 1990, and enacted without an accompanying statute of limitations — thus setting up a search for a statute of limitations in an analogous state law or in another federal law that has some guidance to offer —it may sometimes be appropriate to argue that § 1658 and its four-year period, while not directly applicable, should be the statute applied anyway. If an unseemly disuniformity would result from adoption of a state statute of limitations in a given case, for example, and there also proves to be no other limitations-containing federal claim with policy elements akin to those underlying the claim at issue, the four-year "general" or "catch-all" or "residual" period of § 1658 may be as close to an indication of Congressional intent in respect of the statute of limitations as a court may be able to find anywhere.

The exception to the general rule of applying the most

closely analogous statute of limitations is to apply an analogous federal law:

> There is, of course, a secondary lender, for we have recognized "a closely circumscribed . . . [and] narrow exception to the general rule," *Reed, supra*, at 324, 109 S.Ct., at 625, based on the common sense that Congress would not wish courts to apply a limitations period that would only stymie the policies underlying the federal cause of action. So, when the state limitations periods with any claim of relevance would " 'frustrate or interfere with the implementation of national policies,' " *DelCostello*, 462 U.S. at 161, 103 S.Ct., at 2289, quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367, 97 S.Ct. 2447, 2455, 53 L.Ed.2d 402 (1977), or be "at odds with the purpose or operation of federal substantive law," *DelCostello, supra*, at 161, 103 S.Ct., at 2289, we have looked for a period that might be provided by analogous federal law, more in harmony with the objectives of the immediate cause of action.

North Star Steel Co. v. Thomas, 115 S. Ct. 1927 (1995).

IV.

IF THE SIX-YEAR ERISA STATUTE OF LIMITATION (29 U.S.C. § 1113) FOR FIDUCIARY CLAIMS DOES NOT APPLY TO PETITIONERS' CLAIMS AGAINST GOODYEAR, WHICH WAS THE PLAN ADMINISTRATOR AND A FIDUCIARY, ALABAMA'S SIX-YEAR STATUTE OF LIMITATION FOR CLAIMS ON CONTRACT AT § 6-2-34(9) *CODE OF ALABAMA* 1975 OR ACTIONS FOUNDED ON PROMISES IN WRITING NOT UNDER SEAL AT § 6-2-34(4) *CODE OF ALABAMA* 1975, DOES APPLY.

1. Retaliatory discharges under the Alabama Retaliatory Discharge Statute, § 25-5-11.1 *Code of Alabama* 1975, have been declared to be a tort (*Carraway v. Franklin Ferguson Mfg. Co.*, 507 So. 2d 925 (Ala. 1987)) and not a breach of contract, and are therefore subject to the two-year statute of limitation for torts at § 6-2-38(1) *Code of Alabama* 1975.

2. The Eleventh Circuit has ruled that claims under 29 U.S.C. § 1140 (ERISA) may be in the nature of retaliatory discharge, a tort, as in *Byrd v. MacPapers*, 961 F.2d 157 (11th Cir. 1992), or in the nature of a breach of contract as in *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237 (11th Cir. 1989).

3. The Petitioners' claims are in the nature of breach of contract, not the tort of retaliatory discharge. Petitioners ask for the benefits they were promised in writing and which they have earned under their contract of employment. Said benefits are supposed to be protected by ERISA.

4. The Georgia statute of limitations, O.C.G.A. § 9-3-22 (1982), was selected in *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237 (11th Cir. 1989), because the statute specifically included actions for rights accruing under statutes.

5. Alabama has no statute of limitation for actions accruing under statutes.

6. Petitioner Musick sought reinstatement[1] with full service and benefits, damages allowed by law, and attorney fees (Record Excerpts 1).

7. Since Petitioner Character had been reinstated prior to filing suit, but after he threatened suit, Petitioner Character requested full service time, benefits, damages allowed by law and attorney fees (Record Excerpts 65).

8. Petitioners' claims were in the nature of a contract for benefits earned and accrued during Petitioners' long employment with Respondent.

9. *Hoefel v. Atlas Tack Corp.*, 581 F.2d 1 (C.A. 1978), is the leading case in establishing that pension benefits constitute a binding contractual obligation:

> The promise of a pension constitutes an offer which, upon performance of the required service by the employee becomes a binding obligation. As stated in *Rochester Corp. v. Rochester*, 450 F.2d 118, 120-21 (4th Cir. 1971):
>
> > "The pension plan provided that all employees of the Defendant, if they remained in the employ of the Defendant ten or more years would be entitled, on attaining retirement age, to certain specified pensions rights.

1. Musick was rehired by Defendant after the lawsuit was filed, but he was not given service time, benefits, or damages.

> While unilateral, that offer, when accepted by an employee as evidenced by rendering services for ten or more years, became 'irrevocable' and such employee acquired 'a right no less contractual than if the plan were expressly bargained for.' By rendering service for the period required under the plan, the employee's rights to the benefits under the plan are 'earned no less then the salary paid to him (the employee) each pay period' and are 'in the nature of delayed compensation for former years of faithful service.' Whether the plan be contributory or noncontributory, the benefits, thus earned, are not gratuities."

581 F.2d 4-5.

10. The purpose of ERISA is to protect employees and to provide remedies, and it should be interpreted liberally to effect the intentions of the act.

11. In this case, the statute has been construed narrowly in such a way as to benefit employers and administrators and contrary to the spirit of *Varity Corp. v. Howe*, 116 S. Ct. 1065 (1996).

CONCLUSION

Employees who bring 29 U.S.C. § 1140 claims against an employer/fiduciary should have a six-year statute of limitation under 29 U.S.C. § 1113 and 29 U.S.C. § 1132(a)(3), or under § 6-2-34(4 or 9) *Code of Alabama* 1975. In the alternative, the federal four year statute of limitations, 28 U.S.C. § 1658, should apply.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JUNE 13, 1996

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 95-6277

T.A. MUSICK and JAMES CHARACTER,

Plaintiffs-Appellants,

versus

GOODYEAR TIRE & RUBBER COMPANY, INC.,

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Alabama

BEFORE: KRAVITCH and CARNES, Circuit Judges, and HILL, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellant's T.A. MUSICK and JAMES CHARACTER is denied.

ENTERED FOR THE COURT:

s/ Carnes
UNITED STATES CIRCUIT JUDGE

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-6277

T.A. MUSICK and JAMES CHARACTER,

Plaintiffs-Appellants,

versus

GOODYEAR TIRE & RUBBER COMPANY, INC.,

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND SUGGESTIONS(S) OF REHEARING EN BANC (Opinion _____, 11th Cir., 19__, __F.2d__).

Before: KRAVITCH AND CARNES, Circuit Judges, and HILL, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc

Appendix A

(Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Carnes
UNITED STATES CIRUICT JUDGE

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED APRIL 23, 1996

T.A. MUSICK and James Character,

Plaintiffs-Appellants,

v.

GOODYEAR TIRE & RUBBER COMPANY, INC.

Defendant-Appelle.

No. 95-6277.

United States Court of Appeals,
Eleventh Circuit.

April 23, 1996.

* * *

Appeal from the United States District Court for the Northern District of Alabama.

Before KRAVITCH and CARNES, Circuit Judges, and HILL, Senior Circuit Judge.

PER CURIAM:

The plaintiffs, T.A. Musick and James Character, appeal from the district court's order granting the defendant, Goodyear Tire & Rubber Co., summary judgment. In 1994, almost four years after Goodyear had laid them off from their jobs, the

plaintiffs filed suits claiming that the lay-offs were motivated by Goodyear's desire to deprive them of retirement benefits, in violation of section 510 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1140. They sought back pay and benefits as well as retirement eligibility credit for the time they were laid-off. The district court determined that a two-year statute of limitations was applicable to the plaintiffs' lawsuits and dismissed them.

The plaintiffs conceded that they filed their lawsuits more than two years after their claims accrued (on the date of the lay-offs). But they contend that a six-year statute of limitations governs section 510 actions in Alabama. For the reasons that follow we conclude that the district court was correct in determining that a two-year statute of limitations is applicable to section 510 actions brought in Alabama, at least insofar as back pay, back benefits, and retirement eligibility credit are the remedies sought.[1]

I.

Until 1990, the plaintiffs worked as schedulers, a salaried position, at Goodyear's tire manufacturing plant in Gadsden. The plaintiffs participated in Goodyear's retirement plan for salaried employees. Under that plan, an employee is eligible for full retirement benefits when: (a) he reaches age 55 and has 10 years of service; or (b) he has 30 years of service regardless of age. The plan is governed by ERISA, 29 U.S.C. § 1001 *et seq.* In early 1990, Goodyear notified a number of workers, including the plaintiffs, that due to a reduction in force they would be laid-

1. As explained in note 2 on p. 1710, *infra*, this case does not involve any prayer for reinstatement, so we have no occasion to decide whether a different statue of limitations might apply to such a remedy.

off from work. At that time, Musick was 50 years old, and had been employed by Goodyear for 19 years, 10 months. Character was 45 years old, and had been employed by Goodyear for 25 years, 6 months.

In April of 1994, Character was recalled to work at Goodyear's Gadsden plant. Musick was recalled in August of 1994. However, they were not given credit, for purposes of calculating retirement eligibility, for the time they were laid-off. Consequently, the plaintiffs' retirement eligibility dates were approximately four years later than they would have been but for the lay-offs.

II.

In early 1994, Musick and Character commenced separate actions against Goodyear. Each alleged that Goodyear paid him off, failed to transfer him to another department, and failed to recall him to work in a timely fashion, all with the specific intent to deny him retirement and fringe benefits to which he was entitled under his ERISA plan. Each sought to recover past wages, benefits, and retirement eligibility credit equal to the length of time he was laid-off.

The district court consolidated the plaintiffs' cases. Goodyear moved for summary judgment on the ground that the plaintiffs' actions were barred by the applicable statute of limitations. The district court agreed with Goodyear that the plaintiffs' section 510 claims are governed by a two-year statute of limitations. Applying that two-year limitations period, the district court held that claims arising from the plaintiffs' lay-offs were time-barred because Musick was laid-off four years before commencing his action, and Character was laid-off more than three and one half years before commencing his action.

Appendix B

III.

ERISA does not contain a statute of limitations for section 510 actions. *E.g., Clark v. Coats & Clark, Inc.*, 865 F.2d 1237, 1241 (11th Cir. 1989). Because Congress has not established a time limitation for such actions, "the settled practice has been to adopt a state time limitations as federal law." *Id.* "When adopting a state statute of limitations, we first determine the essential nature of the claim under federal law and then focus on the period applicable to such a claim under the most analogous state law claim" *Id.* The district court followed this course, and we review its analysis *de novo. Byrd v MacPapers, Inc.*, 961 F.2d 157, 159 (11th Cir. 1992).

"In selecting the state statute of limitations most appropriate to the federal cause of action, federal courts must first 'characterize the essence of the claim in the pending case' " *Id.* (quoting *Wilson v. Garcia*, 471 U.S. 261, 268, 105 S. Ct. 1938, 85 L.Ed.2d 254 (1985)). Characterization of the essential nature of an ERISA action is a matter of federal law. *Id.* This Court has characterized an ERISA section 510 claim for these purposes on two occasions, establishing the applicable state law statue of limitations for section 510 claims brought in Georgia and Florida. We have yet to establish the applicable state law statute of limitations for claims brought in Alabama. In doing so now, we will adopt or borrow the statue of limitations Alabama law provides for the most analogous state law cause of action. Our previous decisions in which we have performed the same task in Georgia and Florida cases provide useful guidance for deciding which Alabama cause of action is most analogous to an ERISA section 510 claim.

In *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237, 1241 (11th

Cir. 1989), the plaintiffs were former employees who sued their employer under section 510 of ERISA, seeking back pay, front pay, and reinstatement. The district court held that Georgia's two-year statute of limitations for actions seeking recovery of wages governed the section 510 claims, *Id.* at 1239. We affirmed the district court's holding insofar as the back pay remedy was concerned. *Id.* at 1242.[2]

The Georgia statute of limitations applicable to wage claims is entitled "Enforcement of rights under statutes, acts of incorporation; recovery of wages, overtime, and damages" O.C.G.A. § 9-3-22 (1982). That section provides that "all actions for the recovery of wages, overtime, or damages and penalties accruing under laws respecting the payment of wages and overtime shall be brought within two years after the right of action has accrued." *Id.* In upholding the application of that statute of limitations to the plaintiffs' section 510 claims in *Clark*, we reasoned that "[t]he focus of this statute much more narrowly and specifically contemplates the action now before us than does the general language of O.C.G.A. § 9-3-24 governing contract actions. Therefore, the two-year limitations period . . . is the most analogous statute of limitations and governs appellants' claims." *Clark*, 865 F.2d at 1242.

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2. As to the employees' section 510 claims for reinstatement, however, the Court reversed, and held that Georgia's 20-year statute of limitations applicable to claims for equitable enforcement of statutory rights was applicable. *Clark*, 865 F.2d at 1242.

In this case, we have no occasion to determine which Alabama statute of limitations is applicable to a section 510 claim for reinstatement, because neither plaintiff in this case was seeking reinstatement at the time the district court dismissed the lawsuits. By that time, both plaintiffs had been called back to work, thus mooting any reinstatement remedy.

Appendix B

In *Byrd v. MacPapers, Inc.*, 961 F.2d 157, 158 (11th Cir. 1992), the plaintiff sued her deceased husband's former employer, alleging that the employer discharged her husband because he had refused to surrender medical and disability benefits to which he was entitled under his employee benefits plan. The plaintiff sought recovery of lost wages and benefits, as well as injunctive relief. The district court dismissed the plaintiff's section 510 claim, relying on *Clark* and holding that Florida's two-year statute of limitations governing actions for the recovery of wages barred the plaintiff's claims. We reversed the district court's holding in *Byrd*. In doing so, we characterized the essential nature of the plaintiff's section 510 claim as one for benefits denied by wrongful discharge. *Id.* at 159. Based on that characterization, we reasoned that "Florida Statue § 440.205 is most closely analogous to § 510 of ERISA in that it prohibits the discharge of an employee in relation for the employee's claim or attempted claim for compensation under Florida workers' compensation law." *Id.* A four-year statute of limitations governed claims under section 440.205. *Id.* at 160.

We concluded in *Byrd* that the district court, in determining the most closely analogous Florida cause of action, had erred by relying on *Clark's* analysis of Georgia law. *Id.* Causes of action sometimes vary from state to state, as do statutes of limitation. Alabama, like Florida, has a provision in its worker's compensation statutes addressing retaliatory discharge. Section 25-5-11.1 of the Alabama Code provides that "[n]o employee shall be terminated by an employer solely because the employee has instituted or maintained any action against the employer to recover workers' compensation benefits under this chapter." The Alabama Supreme Court has held that claims brought under that section are subject to the two-year statute of limitations found in section 6-2-38. *ConAgra, Inc. v. Adams*, 638 So.2d 752, 753-54

(Ala. 1994). Likewise, Alabama has a statute of limitations for the recovery of wages that is materially identical to the Georgia provision applied in *Clark*. Section 6-2-38(m) of the Alabama Code provides: "All actions for the recovery of wages, overtime, damages, fees, or penalties accruing under the laws respecting payment of wages, overtime, damages, fees, and penalties must be brought within two years."

There is no provision of Alabama law more closely analogous to a section 510 action than those two provisions; therefore, the more analogous of those two Alabama provisions is the one that determines the statute of limitations period for section 510 ERISA claims in Alabama. The plaintiffs argue that Alabama's general six-year statute of limitations governing "[a]ctions upon any simple contract or specialty not enumerated [specifically]." Ala. Code § 6-2-34(9), should govern section 510 actions in Alabama. We reject this argument for the same reason we rejected it in *Clark:* other provisions of state law "more narrowly and specifically contemplate[ ] the [section 510] action now before us than does the general language" of the state's statute of limitations generally governing contract actions. 865 F.2d at 1242.

Because the two provisions of Alabama law most analogous to a section 510 ERISA action—one for wages, the other for retaliatory discharge—both have a two-year statute of limitations, we need not decide which is more analogous. Either way, there is a two-year statute of limitations for filing section 510 claims in Alabama. Accordingly, the district court correctly held that the plaintiffs' lawsuits, which were filed more than two years after the alleged section 510 claims accrued, are time-barred.

AFFIRMED.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, MIDDLE DIVISION DATED MARCH 6, 1995

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

CV 94-PT-1132-M

T.A. MUSICK

PLAINTIFF,

v.

GOODYEAR TIRE & RUBBER COMPANY,

DEFENDANT.

CV 94-PT-1348-M

JAMES CHARACTER,

PLAINTIFF,

v.

GOODYEAR TIRE & RUBBER COMPANY,

DEFENDANT.

Appendix C

ORDER

The court is considering plaintiffs' Motion to Reconsider Order of February 2, 1995 as to Matters Relating to Statutes of Limitations, filed on February 14, 1995. Although the court in *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237 (11th Cir. 1989), suggested that an ERISA § 510 claim is of a contractual nature, the court proceeded to apply Georgia's statutes of limitations for recovery of wages to plaintiff's claims for wages. A claim for wages is, in the abstract, an action on an employment contract. However, where the state law provides for a specific statute of limitations applicable to a claim for wages, it cannot be argued that the statute of limitations applicable to contracts in general applies to a claim for wages; clearly, the statute applicable to a claim for wages controls. Thus, there is nothing inconsistent with the suggestion of the Eleventh Circuit, or of this court, that, although the § 510 claim is one sounding in contract, Alabama's specific statute of limitations applicable to claims for wages should govern a § 510 claim seeking recovery of wages.

Accordingly, plaintiffs' Motion to Reconsider is DENIED.

DONE and ORDERED this 6th day of March, 1995.

s/ Robert B. Propst
ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, MIDDLE DIVISION DATED FEBRUARY 2, 1995

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

CV 94-PT-1132-M

T.A. MUSICK,

PLAINTIFFS,

v.

GOODYEAR TIRE & RUBBER COMPANY, INC.,

DEFENDANT.

CV 94-PT-1348-M

JAMES CHARACTER,

PLAINTIFF,

v.

GOODYEAR TIRE & RUBBER COMPANY,

DEFENDANT.

Appendix D

ORDER

In accordance with a Memorandum Opinion filed contemporaneously herewith, the Motion for Summary Judgment, filed by defendant Goodyear Tire & Rubber Company, is **GRANTED** as to all claims under § 510 alleging a discriminatory layoff or a failure to transfer. Plaintiffs are hereby **ORDERED** to submit, within ten days from the entry of this Order, substantial evidence, if any, of new and discrete acts of discrimination, occurring within the statute of limitations period, which supports their § 510 claims for failure to recall.

DONE and ORDERED this 2nd day of, February, 1995

s/ Robert B. Propst
ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

APPENDIX E —MEMORANDUM OPINION IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, MIDDLE DIVISION DATED FEBRUARY 2, 1995

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

CV 94-PT-1132-M

T.A. MUSICK

PLAINTIFF,

v.

GOODYEAR TIRE & RUBBER COMPANY,

DEFENDANT.

CV 94-PT-1348-M

JAMES CHARACTER,

PLAINTIFF,

v.

GOODYEAR TIRE & RUBBER COMPANY,

DEFENDANT.

Appendix E

MEMORANDUM OPINION

This cause comes to be heard on cross-motions for summary judgment. Both plaintiffs and defendant have submitted briefs and filed evidentiary materials in support of their various positions.

FACTS AND CONTENTIONS

The court derives the pertinent facts from the evidentiary materials on file.[1]

I. *Facts*

Until 1990, plaintiffs worked as Schedulers, a salaried position, at defendant's tire manufacturing plant in Gadsden, Alabama. Pretrial Order at 2. As employees, plaintiffs were participants in defendant's retirement plan for salaried employees, as well as its health care coverage plan. *Id.* Under defendant's retirement plan, an employee is eligible to obtain full retirement benefits when (a) he reaches age 55 and has 10 years of service, or (b) he has 30 years of service, regardless of age. Depo. of Hill Mayfield at 20. The plan is governed by the Employees' Retirement Income Security Act of 1972 (ERISA), 29 U.S.C. § 1001 et seq. Pretrial Order at 2.

On January 29, 1990, defendant notified plaintiff Musick that, due to a reduction in force, he would be laid off from work. Plaintiff Musick was laid off from his position on April 17, 1990. *Id.* At the time of his layoff, Musick was 50 years old, and had

1. For summary judgment purposes, the court is required to draw all reasonable inferences from the facts in the light most favorable to the non-moving party.

been employed by defendant for 19 years, 10 months. *Id.* On September 5, 1990, plaintiff Character was laid off from his position. *Id.* At that time, plaintiff Character was 45 years old, and had been employed by defendant for 25 years, 6 months. *Id.*

Plaintiff Musick filed a charge with the Equal Employment Opportunity Commission on February 22, 1990. Depo. of Musick at 57, 120-21. Plaintiff Character filed a discrimination charge with the EEOC on January 28, 1991. Depo. of Character at 170. In their discrimination charges, plaintiffs contended that their layoffs were motivated by their age, in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C.§ 621 (1988). Depo. of Musick at 121, Exh. 8; Depo. of Character at 170, Exh. 4. On September 24, 1990, the EEOC issued to plaintiff Musick at right to sue letter. Depo. of Musick at 178-79. On October 7, 1991, EEOC issued a right-to-sue letter to plaintiff Character. Depo. of Character at 174. Although each plaintiff had apparently retained counsel prior to an EEOC determination, neither plaintiff commenced an action. *See* Depo. of Musick at 76-77 (noting that plaintiff Musick had consulted with Mike Quinn, Esq. in 1990); Depo. of Character at 111-14.[2]

Plaintiff Musick was recalled to work at defendant's Gadsden plant on August 1, 1994. Pretrial Order at 2. Had he remained employed through the layoff, plaintiff Musick would have been eligible for retirement on November 13, 1994. *Id.* at 6.

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2. From 1990 until 1992, plaintiff Character was represented by the Birmingham firm of Gordon, Silberman, Wiggins & Childs. Depo. of Character at 111-14. Attorneys from that firm advised plaintiff Character that his layoff may have violated the ERISA laws. *Id.* at 115. The Gordon, Silberman firm apparently ceased their representation of plaintiff Character in 1992, when plaintiff Character became disgruntled about his fee arrangement with the firm. *Id.* at 114.

Plaintiff Character was recalled to work on April 5, 1994. Had he remained employed by defendant through the layoff, plaintiff Character would have been eligible for retirement on March 22,1995.

Based on these events, plaintiff Musick commenced the present action on April 14, 1994. Musick Complaint at 1. Plaintiff Character commenced his action on May 6, 1994. Character Complaint at 1. In their complaints, plaintiffs allege that defendant laid them off with the specific intention of denying them retirement and fringe benefits to which they were entitled, in violation of § 510 of ERISA, 29 U.S.C. § 1140. Character Complaint at 1; Musick Complaint at 1. Plaintiffs also allege that defendant, motivated by its intent to deprive them of ERISA benefits, violated § 510 of ERISA by failing to transfer them to another department, and thereby avoid their being laid off. Character Complaint at 1; Musick Complaint at 1. Finally, plaintiffs allege that defendant, motivated by a desire to deprive them of ERISA benefits, failed to recall them in a timely fashion, in violation of § 510. Plaintiffs seek to recover both past benefits and past wages to which they are allegedly entitled. Character Complaint at 2; Musick Complaint at 1.[3]

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3. Plaintiffs initially sought recovery for compensatory and punitive damages, as well as reinstatement. By Order of September 26, 1994, this court granted without objection defendant's Motion to Strike said claims. Moreover, since both plaintiffs have been recalled to work, claims for reinstatement are moot.

Appendix E

II. *Pertinent*[4] *Contentions of the Parties*

Defendant argues that, because plaintiffs' actions are barred by the applicable statute of limitations, it is entitled to summary judgment as to each of plaintiffs' § 510 claims. Citing *Byrd v. MacPapers, Inc.*, 961 F.2d 157, 159 (11th Cir. 1992), defendant argues that, because ERISA does not contain a statute of limitations, federal courts must apply the statute of limitations applicable to the state-law cause of action most closely analogous to the ERISA action in question. Defendant argues, citing *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237, 1241-42 (11th Cir. 1989), that the state-law cause of action most closely analogous to a § 510 ERISA claim is an action for recovery of wages. Defendant notes that, under *Ala. Code* § 6-2-38(m), Alabama law requires that actions for the recovery of wages be commenced within two years after the cause of action accrues. Thus, defendant contends, the two-year statute of limitations set forth in *Ala. Code* § 6-2-38(m) governs the ERISA claims in issue.

Applying that statute of limitations to the facts, defendant argues that it is entitled to summary judgment as to each of plaintiffs' § 510 theories. First, defendant argues that plaintiffs' § 510 claims concerning the initial layoffs in 1990 as well as plaintiffs' failure-to-transfer claims,[5] are time-barred. Given

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4. Because of the court's resolution of the statute of limitations issue, the court finds it unnecessary to review the voluminous discussions of the parties concerning the merits of plaintiffs' § 510 claims.

5. Defendant does not advance a statute-of-limitations argument specifically addressing failure-to-transfer claims. Apparently, the gravamen of the failure-to-transfer claims is that, instead of laying plaintiffs off, defendant should have transferred them to other positions within defendant's

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that plaintiff Musick was laid off on April 17, 1990, defendant argues, Musick's § 510 claim concerning the initial layoff became time-barred on April 17, 1992, two years after said cause of action accrued. Since, defendant claims, plaintiff Musick did not commence his action until April, 1994, his § 510 layoff claim is barred. Likewise, defendant asserts that, given that plaintiff Character was laid off on September 5, 1990, his § 510 claim concerning the initial layoff became time-barred on September 5, 1992. Since, according to defendant, Character commenced the present action in May, 1994, his action is barred by the statute of limitations.

Second, defendant argues that plaintiffs' failure-to-recall claims are barred by the statute of limitations. Citing *Allen v. Diebold, Inc.*, 807 F. Supp. 1308 (N.D. Ohio 1992), *aff'd.*, 33 F.3d 624 (6th Cir. 1994), and *Burnam v. Amoco Container Co.*, 755 F.2d 893, 894 (11th Cir. 1985), defendant argues that, absent a new and discrete act of discrimination in refusing to re-hire, an employer's failure to recall does not present a continuing discriminatory act which can bring the employee's initial layoff within the limitations period. Defendant contends that, because there is no evidence of any "new and discrete act" occurring after plaintiffs' layoff which could evidence a continuing violation of § 510, summary judgment is due to be granted as to plaintiffs' failure-to-recall claims.

Plaintiffs counter that their claims are not barred by the statute of limitations. Plaintiffs agree that, since ERISA contains

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Gadsden plant. Given that the alleged failure to transfer occurred at the time of the layoff, the court considers defendant's argument concerning application of the statute of limitations to plaintiffs' layoff claims to apply to plaintiffs' failure-to-transfer claims as well.

no statute of limitations, federal courts apply to § 510 claims the statute of limitations applicable to the most analogous state-law claim. Citing *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237, 1242 (11th Cir. 1989), plaintiffs contend that a § 510 claim is a claim grounded in contract. Citing *Hoffman-La Roche, Inc. v. Campbell*, 512 So. 2d 725 (Ala. 1987), plaintiffs reason that, under Alabama law, an employer's termination of an employee to avoid payment of medical benefits states a breach of employment contract claim. Accordingly, plaintiffs assert that *Ala. Code* § 6-2-34, Alabama's statute of limitations for actions on contract, applies to their § 510 claims. Plaintiffs argue that, since they commenced the present actions within six years from the date of their layoff, none of their § 510 claims are barred by the applicable statute of limitations.

ANALYSIS OF THE COURT

Summary judgment is appropriate only if this court concludes that there exists no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. FED. R. CIV. P. 56(c). *See Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 249 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A party seeking summary judgment bears the initial responsibility of informing this court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, admissions on file, and any affidavits which it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. Once the moving party has met this burden, the nonmoving party "must produce evidence that shows there exists a genuine issue of material fact." *Cottle v. Storer Communication, Inc.*, 849 F.2d 570, 575 (11th Cir. 1988). Rule 56(e) requires the nonmoving party to go beyond the pleadings and by affidavits, or by the depositions,

answers to interrogatories, and admissions on file designate specific facts showing there exists a genuine issue for trial. *Celotex*, 477 U.S. at 324. The court may consider the offered "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any . . ." in deciding whether to grant or deny a summary judgment motion. FED. R. CIV. P. 56(c). In making the determination of whether a given factual dispute requires submission to a jury, the court must view the presented evidence through the prism of the substantive evidentiary burden. *Anderson*, 477 U.S. at 254-55.

There are three connected issues before the court:

1. Which Alabama statue of limitations applies to a claim under § 510 of ERISA?

2. Applying that statute of limitations, are plaintiffs' wrongful layoff claims and failure-to-transfer claims time-barred?

3. If plaintiffs' wrongful layoff and failure-to-transfer claims are time-barred, have plaintiffs presented substantial evidence to suggest that defendant engaged in new and discrete actions, occurring within the limitations period, which can form the basis of their failure-to-recall claims?

I. Alabama's two-year statutes of limitation apply to claims under § 510 of ERISA for past wages, past benefits, and reinstatement.

"ERISA does not contain a statute of limitations of § 510[6]

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6. Under § 510 ERISA,

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claims" *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237, 1241 (11th Cir. 1989). Accordingly, "a federal court hearing an ERISA action must define the essential nature of the ERISA action and apply the forum state's statute of limitations for the most closely analogous claim." *Byrd v. MacPapers, Inc.*, 961 F.2d 157, 159 (11th Cir. 1992). "In selecting the state statue of limitations most appropriate to the federal cause of action, federal courts must first 'characterize the essence of the claim in the pending case.' " *Byrd*, 961 F.2d at 159, *quoting Wilson v. Garcia*, 471 U.S. 261, 268 (1985). Characterization of a federal claim is accomplished through examination of the elements of the federal cause of action, and congressional intent behind the statute. *Byrd*, 961 F.2d at 159. "Characterization of the essential nature of the ERISA action is a matter of federal law." *Id.; accord Wilson*, 471 U.S. at 268-69.

The Eleventh Circuit has engaged in characterization of an ERISA § 510 claim for statue-of-limitations purposes on two occasions. First, in *Clark Coats & Clark, Inc.*, 865 F.2d 1237,1238 (11th Cir. 1989), former employees sued their employer under § 510 of ERISA, seeking back pay, front pay, and reinstatement. Plaintiffs alleged that, in violation of § 510, their employer terminated them for the purpose of interfering with their attainment of pension and retirement benefits. *Id.* The undisputed facts revealed that some plaintiffs were terminated in

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(Cont'd)

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary [of an ERISA plan] for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . , or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . .

29 U.S.C. § 1140 (1988).

December, 1983, others were fired in March, 1985.[7] *Id.* Plaintiffs sued in September, 1987. *Id.* at 1239. Defendant moved to dismiss claims against most[8] plaintiffs, arguing that the two-year Georgia statute of limitations for actions for recovery of wages[9] applied to plaintiffs' § 510 claims for reinstatement, however, the court reversed, reasoning that Georgia's 20-year statute of limitations applicable to claims for equitable enforcement of statutory rights did not bar those claims. *Id.* In reaching its conclusions, the court characterized the § 510 claims in issue as being founded on contract:

> The focus of the ERISA statute at issue does not encompass individual or personal rights. The primary purpose of ERISA is to provide adequate retirement income to persons who have spent their careers in a productive work capacity. . . . These rights cannot be regarded as anything other than economic, and to characterize their violation as "personal injuries" would be a distortion of language. Hence we reject the application of [the Georgia statute of limitations] governing personal injury claims. The claims are founded on contract.

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7. Plaintiff Clark was terminated in October, 1985. *Clark*, 865 F.2d at 1239.

8. Defendant did not move to dismiss against plaintiff Clark because his claim fell within the two-year limitations period which, as defendant argued, applied to the § 510 claims.

9. O.C.G.A. § 9-3-22.

Id. at 1242. The court held, however, that the statute of limitations governing recovery of wages and enforcement of statutory rights, rather than the statute addressing contracts in general, applied to § 510 claims:

> The appellants suggest that O.C.G.A. § 9-3-24 governing actions upon "simple contracts in writing" is the most closely analogous state limitations period. Appellants' claims, predicated upon a statutory right, seek recovery of wages and reinstatement of pension rights. O.C.G.A. § 9-3-22 which was applied by the trial court addresses actions to enforce statutory rights and speaks specifically to the recovery of wages. The focus of this statute much more narrowly and specifically contemplates the action now before us then does the general language of O.C.G.A. § 9-3-24 governing contract actions. Therefore, the two-year limitations period for recovery of wages, and a 20-year limitations period for equitable enforcement of statutory rights such as appellants seek in their reinstatement claims.

Id. at 1242. Thus, the court concluded that plaintiffs' claims for wages were barred by the two-year limitations period, but that claims for reinstatement were not barred by the 20-year limitations period applicable to equitable enforcement of statutory rights. *Id.*

Second, in *Byrd v. MacPapers, Inc.*, 961 F.2d 157, 158 (11th Cir. 1992), plaintiff sued her deceased husband's former

employer, alleging that, in violation of § 510, the employer had discharged her husband for his refusal to surrender medical and disability benefits to which he was entitled under the employee benefits plan. Plaintiff sought recovery of lost wages and benefits, as well as injunctive relief. *Id.* The district court dismissed plaintiff's § 510 claim. *Id.* Relying on *Clark*, the district court held that Florida's two-year statute of limitations governing actions for the recovery of wages barred plaintiff's claims. *Id.* at 160.

The Eleventh Circuit reversed. *Id.* at 159. The court characterized "[t]he essential nature of plaintiff's [§ 510] claim [as] that of a suit for benefits denied by . . . wrongful discharge . . ." *Id.* Based on that characterization, the court reasoned that "Florida Statute § 440.205 is most closely analogous to § 510 of ERISA in that it profits the discharge of an employee in retaliation for the employee's claim or attempted claim for compensation under Florida worker's compensation law." *Id.* Citing *Scott v. Otis Elevator Co.*, 524 So. 2d 642, 643 (Fla. 1988), the court noted that a Florida four-year statute of limitations applied to claims under § 440.205. *Id.* at 160. The court rejected the district court's reliance on *Clark*, noting that the case "applied Georgia rather than Florida statutes of limitations."[10] *Id.* Thus, the court concluded that plaintiff's claims under § 510

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10. This court can fathom several possible explanations for the different results. First, it should be noted that this court, despite thorough research, was unable to uncover any provision in Georgia worker's compensation statutes similar to the Florida statute upon which the *Byrd* court relied. The absence of such a statute in Georgia could constitute a plausible explanation for the distinction between *Byrd* and *Clark*.

Moreover, the plaintiff in *Byrd*, unlike plaintiffs in *Clark* was seeking to recover benefits as well as wages. Perhaps the presence of a claim for benefits

(Cont'd)

of ERISA were not barred by the applicable four-year statute of limitations. *Id.*

Upon first examination of the holdings in *Clark* and *Byrd*, this court appears to be faced with conflicting, yet controlling, authorities. On the one hand, *Clark* dictates that a state-law claim for wages and equitable enforcement of statutory rights is most closely analogous to an ERISA § 510 claim. On the other hand, *Byrd* holds, in the face of *Clark*, that a state-law claim for an employer's discharge of an employee for the employee's seeking to obtain worker's compensation benefits is most closely analogous to an ERISA § 510 claim. The conflict is even more apparent upon an examination of Alabama law, which provides for claims and limitations periods for recovery of wages, for enforcement of statutory rights, and for retaliatory discharge under the worker's compensation statutes. *See Ala. Code* §§ 6-2-38(j) (statute of limitations for actions qui tam or for a penalty prescribed by statute); 6-2-38(1) (statute of limitations on a claim for enforcement of other statutory rights); 6-2-38(m) (statute of limitations for actions for recovery of wages); 25-5-11.1 (creating cause of action for retaliatory discharge for claims asserted under the worker's compensation laws).

(Cont'd)

made the § 510 claim in *Byrd* compensation laws than a simple claim for wages. This difference in the factual posture of the cases may also explain the seemingly incongruent results in *Byrd* and *Clark*.

Another possible explanation is that, in *Byrd*, the defendant's action was alleged to be in retaliation, for a specific course of conduct of the employee, his refusal to surrender medical and disability benefits. Here, the allegation is that the defendant took its actions, not in response to any specific conduct, but as a part of a general scheme to avoid attainment of retirement benefits. Clearly, *Clark* is more pertinent here.

Appendix E

This court need not reconcile any apparent conflict between *Byrd* and *Clark*: both cases support this court's conclusion that Alabama's two-year statute of limitations, set forth in *Ala. Code* § 66-2-38, applies to claims for violations of § 510 of ERISA. Following *Clark*, the court characterizes the § 510 claims in issue to the extent those claims seek recovery for past wages, as claims for the recovery of wages. Under *Ala. Code* § 6-2-38(m), "[a]ll actions for the recovery of wages, overtime, damages, fees, or penalties accruing under the laws respecting the payment of wages, overtime, damages, fees, and penalties must be commenced within two years." *Ala. Code* § 6-2-38(m) (1993). Moreover, following *Clark*, this court characterizes plaintiffs' claims for reinstatement as claims for enforcement of statutory rights.[11] Two possible provisions of Alabama's two-year limitations statute could apply to those claims. First, under *Ala. Code* § 6-2-38(j), "[a]ll actions qui tam or for a penalty given by statute to the party aggrieved . . . must be brought within two years *Ala. Code* § 6-2-38(j) (1993). Second, "[a]ll actions for any injury to the person or rights of another not arising from contract and not specifically enumerated . . . must be brought within two years. *Ala. Code* § 6-2-38(1) (1993). Following *Clark*, this court concludes that the two-year statute of limitations in *Ala. Code* § 6-2-38 applies to plaintiffs' claims under § 510 ERISA.

This court could also follow *Byrd* to reach an identical result. If, in light of the analysis in *Byrd*, this court were to conclude that plaintiffs' claims for recovery of benefits and wages under § 510 of ERISA are most closely analogous to claims brought under *Ala. Code* § 25-5-11.1, the claims would

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11. Although the *Clark* court stated that the § 510 claims were "founded on contract" the court applied a statute of limitations to reinstatement claims which related to the enforcement of statutory rights.

still be time-barred. By virtue of § 25-5-11.1, "[n]o employee shall be terminated by an employer solely because the employee has instituted or maintained any action against the employer to recover worker's compensation benefits under this chapter. . . ." *Ala. Code* § 25-5-11.1 (1992). The Alabama Supreme Court recently held that claims brought under this section are subject to the two-year statute of limitations found in *Ala. Code* § 6-2-38. *Conagra, Inc. v. Adams*, 638 So. 2d 752, 753-54 (Ala. 1994). Accordingly, even following *Byrd*, the court concludes that plaintiffs' claims under § 510 of ERISA are subject to a two-year statute of limitations.[12]

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12. Plaintiffs have argued that *Blue Cross & Blue Shield v. Weitz*, 913 F.2d 1544 (11th Cir. 1990), suggests a conclusion to the contrary. In that case, involving a claim under § 502 of ERISA, 29 U.S.C. § 1132, by a plan fiduciary to recover wrongful payments, the court suggested, but did not decide, that Alabama's six-year statute of limitations applied to the claims in issue. *Id.* at 1551 n.12. Since the claims in issue in *Weitz* were brought under § 502, and not § 510, the case in no way suggests that claims under § 510 of ERISA should be subject to a six-year statute of limitations.

Additionally, plaintiffs have cited *Hoffman-LaRoche, Inc. v. Campbell*, 512 So. 2d 725 (Ala. 1987), for the proposition that, under Alabama law, a claim for wrongful discharge to avoid payment of medical benefits stated a claim for breach of contract. *Campbell* does not stand for that proposition. Rather, the *Campbell* court held that "the language contained in a[n] [employment] handbook can be sufficient to constitute an offer to create a binding unilateral contract. *Id.* at 735. Moreover, even assuming that the holding in *Campbell* is as plaintiffs have represented, which it is not, the characterization of an ERISA claim is a matter of federal, and not state, law. *Byrd*, 961 F.2d at 159. Accordingly, *Campbell* would not be determinative on this court's characterization of the ERISA claim in issue.

II. Applying the two-year statute of limitations to this case, plaintiffs' claims under § 510 for their alleged wrongful layoff, as well as their claims for failure to transfer, are time-barred.

Plaintiff Musick was laid off from his position with defendant on April 17, 1990. Musick commenced his present action against defendant on April 14, 1994. Applying the two-year statute of limitations, Musick's claim that his layoff was accomplished in violation of § 510 of ERISA is time-barred. Similarly, plaintiff Character was laid off on September 5, 1990. Character commenced his action on May 6, 1994. Character's § 510 claim asserting a discriminatory layoff is time-barred by the two-year statute of limitations.

Plaintiff's failure-to-transfer claims are barred in the same manner. Plaintiffs have not explained the substance of those claims. Presumably, plaintiffs allege that, in lieu of laying them off, defendant should have transferred plaintiffs to other positions. Thus, defendant's failure to transfer plaintiffs occurred at the same time as the actual layoff. Accordingly, plaintiffs' failure-to-transfer claims are barred by the two-year statute of limitations.

III. Have plaintiffs presented substantial evidence to suggest that defendant engaged in new and discrete actions, occurring within the limitations period, which can form the basis of their failure-to-recall claims?

Having concluded that plaintiffs' failure to transfer and discriminatory layoff claims are barred by the statute of limitations, the court must now consider whether plaintiffs' failure-to recall claims are also time-barred.

Appendix E

"It is well established that a layoff from employment constitutes a completed act at the time it occurred. . . . , and that an employer's failure to recall or rehire does not constitute a continuing violation of [the employment discrimination laws]." *Lawson v. Burlington Industries, Inc.*, 683 F.2d 862, 864 (4th Cir.), *cert. denied*, 459 U.S. 944 (1982); *accord Allen v. Diebold, Inc.*, 807 F. Supp. 1308, 1322 (N.D. Ohio 1992) ("the mere continuity of unemployment due to lay-off . . . does not extend a plaintiff's cause of action because that would lead to the ridiculous result that no termination complaint could ever be time-barred if a subsequent discriminatory failure to rehire is alleged"), *aff'd.*, 33 F.3d 624 (6th Cir. 1994) (internal quotation omitted). For this reason, "a failure to rehire subsequent to an allegedly discriminatory firing, absent a new and discrete act of discrimination in the refusal to rehire itself, cannot resurrect the old discriminatory act." *Burnam v. Amoco Container Co.*, 755 F.2d 893 (11th Cir. 1985); *accord Dumas v. Town of Mt. Vernon*, 612 F.2d 974, 977 (5th Cir. 1980).

This court has determined that plaintiffs' claims under § 510 for refusal to transfer and for discriminatory layoff are barred by the applicable two-year statute of limitations. According to *Burnam*, absent proof of a "new and discrete act of discrimination in the refusal to rehire itself," plaintiffs' claims for failure to rehire, like their claims for discriminatory layoff and failure to transfer, will be barred by the statute of limitations. Thus, in order to survive defendant's motion for summary judgment, plaintiffs must present substantial evidence of a new and discrete act, occurring within the limitations period, which could form the basis for their failure-to-recall claims.

Plaintiffs' responsive brief does not address this issue.

It only states:

> Defendants [sic] have not presented a basis by which this court should dismiss [for lack of substantial evidence] Plaintiffs' claims for failure to transfer or failure to recall. Therefore, it has failed to meet its opening burden under *Celotex [Corp.] v. Catrett*, 477 U.S. 321, 323 (1986), which requires the movant to inform the Court of the basis of its motion and to identify evidence demonstrating the absence of any issue of material fact. . . . The remainder of this section, therefore, is devoted to proving a prima facie case of Defendant's discriminatory layoff for the purpose of interfering with Plaintiffs' ERISA rights.

Plaintiffs' response to Defendants's Motion for Summary Judgment at 2-3.

Assuming, without deciding,[13] that defendant did not

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13. The court finds plaintiffs' position somewhat incredible. In its brief in Support of its Motion for Summary Judgment, defendant quotes at length from the deposition of plaintiff Character:

> Q. Is there any evidence that supports any contention that you were laid off to inferfere in any way with your attaining any ERISA protected benefit?
>
> A. (Witness shakes head negatively.) Don't think so.

(Cont'd)

properly raise the recall issue on summary judgment, the court deems it appropriate to raise the recall issue at this juncture. *See Celotex*, 477 U.S. at 326 ("district courts are widely acknowledged to possess the power to enter summary judgments

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(Cont'd)

> Q. Is there any evidence that you have to support your contention that any failure to recall you to any position was for the purpose of interfering with your attainment of any ERISA protected benefit?
>
> A. Don't have anything. (Witness shakes head negatively.)
>
> Q. Has there been anyone in any position of management, supervision, labor relations, personnel, industrial relations or the labor department who said anything to any effect that any benefit had anything to do with your layoff?
>
> A. (Witness shakes head negatively.) No, sir.
>
> Q. Is there anything in writing that you have seen of or heardof that might indicate or support a claim or contention that any benefit had anything to do with your layoff?
>
> A. No, sir.
>
> Q. Would the same thing be true with respect to any claim relating to a recall to any position?
>
> A. Correct. It would.

(Cont'd)

sua sponte, so long as the losing party was on notice that she had to come forward with all of her evidence"). Accordingly, the court will direct plaintiffs to present to the court, within ten days from this date, substantial evidence, if any, of new and discrete acts of discrimination, occurring within the limitations period, which could form the basis for their failure-to-recall claims. Failure to present substantial evidence to this effect will render all of plaintiffs, claims barred by the statute of limitations.

This 2nd day of February, 1995.

s/ Robert B. Propst
ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

(Cont'd)

> Q. As far as you know do you have any evidence to support any claim that Goodyear or anybody connected with Goodyear had any intent to interfere with your attainment of any benefit protected by ERISA?
>
> A. No, sir I don't have any evidence of that.

Depo. of Character at 168-69. In the court's view, defendant's quoting of this deposition testimony was sufficient to raise the recall issue for summary judgment purposes.